

1.4 **Citations Discussed.** WAC 358-30-170; WAC 356-30-300; WAC 356-30-270; WAC 356-30-290; WAC 356-30-260; RCW 41.06.176; and RCW 41.06.186.

II. MOTIONS

2.1 On July 12, 1999, the Board considered written argument on Respondent's Motion to Dismiss. The Board considered the files and documents in this matter, including: Respondent's Motion to Dismiss, filed June 8, 1999, and Appellant's Response to Respondent's Motion to Dismiss, filed July 9, 1999.

2.2 Respondent argued that the appeal should be dismissed because Appellant was not a permanent employee and did not have a right to appeal. Respondent asserted that Appellant was a probationary employee at the time of his separation, and therefore, the Board could not grant reinstatement as a remedy to his appeal.

2.3 Appellant argued that he was a permanent employee. Appellant asserted that this fact was in dispute and that because a genuine issue of material fact existed, the appeal should not be dismissed. Appellant agreed that if the Board found that he was a probationary employee, he does not have appeal rights.

2.4 The Board may decide any part of all of an appeal on a motion to dismiss where there is no genuine issue as to any material fact and the appeal should be decided or dismissed as a matter of law. WAC 358-30-060(1). All facts and reasonable inferences therefrom are to be determined in favor of the nonmoving party. See Hall v. University of Washington, PAB No. 3863-V2 (1995).

1 2.5 There are no issues of material fact that must be resolved to decide Respondent's Motion to
2 Dismiss. The issue presented to the Board is whether Appellant has standing to bring a rule
3 violation appeal. We are able to make this determination based on the uncontroverted facts
4 presented by the parties.

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6 2.6 The Board orally denied Respondent's Motion to Dismiss. Probationary employees cannot
7 appeal their rejection, therefore, a remedy of reinstatement is not appropriate. However, in a rule
8 violation appeal, the Board may fashion an appropriate remedy, provided a meaningful remedy is
9 available. Therefore, even if Appellant was a probationary employee at the time of his separation,
10 he has standing to bring a rule violation appeal.

11 12 **III. PRELIMINARY MATTER**

13 3.1 At the outset of the hearing on this appeal, Appellant stated that he had improperly filed his
14 appeal as a rule violation appeal and that his appeal should have been filed as a dismissal case.
15 Appellant argued that it was necessary to determine whether he was a probationary employee or a
16 permanent employee before proceeding with the hearing on his appeal.

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18 3.2 Respondent objected because Appellant's request was not timely and proper notice of this
19 issue had not been given by Appellant.

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21 3.3 The Board clarified that the matter before them was a rule violation appeal and the issue of
22 whether Appellant was a permanent or probationary employee at the time of his separation was not
23 before the Board.

IV. FINDINGS OF FACT

4.1 Appellant Harold Kupers was a Correctional Officer 2 for Respondent Department of Corrections (DOC) and Larch Corrections Center. Appellant and Respondent are subject to Chapters 41.06 and 41.64 RCW and the rules promulgated thereunder, Titles 356 and 358 WAC. Appellant filed a timely rule violation appeal with the Personnel Appeals Board on February 10, 1999.

4.2 Prior to his employment at Larch Corrections Center (LCC), Appellant had been employed with the Department of Corrections. He resigned from his previous employment in November 1996. He was reemployed at LCC on August 1, 1998. (Ex. R-5).

4.3 Prior to his reemployment at LCC, Appellant submitted a Washington State Job Application Form and his name was placed on the reemployment register maintained by the Department of Personnel. Appellant's name was referred to LCC, he was given a telephonic interview, and he was hired as a Correctional Officer 2. (Ex. R-4).

4.4 Appellant was not given an appointment letter nor informed in writing of his employment status.

4.5 WAC 356-30-260 provides, in relevant part:

(1) Employees who receive appointments to permanent positions from the open competitive register and the reemployment register shall serve a probationary period of six to twelve months as determined by the board. The board shall designate a probationary period of six months for all positions in a class unless they determine that job requirements of the class require a longer period (up to twelve months) to provide adequate training and/or evaluation. . . .

. . . .

1 (2) All persons at time of appointment shall be notified in writing by the agency of
the length of their probationary period. . . .

2 (3) The probationary period will provide the appointing authority with the
3 opportunity to observe a new employee's work, to train and aid the new employee in
4 adjustment to the position, and to terminate any employee whose work performance
fails to meet the required standards.

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6 (8) Permanent appointment of a probationary employee shall be automatic unless the
7 person is dismissed under provision of WAC 356-30-270.

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10 4.6 Appellant asserts that approximately six weeks after Appellant began his employment, he
11 was transferred from a custody officer position to a security officer position and that his transfer
12 was not reported to the Department of Personnel. Appellant provided no evidence or
13 documentation to support his assertion. The credible evidence establishes that Appellant remained
14 classified as a Correctional Officer 2 throughout his employment at LCC.

15
16 4.7 WAC 356-30-290 states that “[a] probationary employee may be assigned to another
17 position in the same class or may accept a temporary appointment to a higher class in the same class
18 series if both positions are in the same work unit and the agency shall notify the director of
19 personnel of the change.

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21 4.8 During his employment at LCC, Appellant was given 20 hours of training, including an
22 employee orientation. He had an extensive history of training in his previous employment with
23 DOC (Ex. R-13). In addition, Appellant was given verbal instructions and guidance during the day-
24 to-day performance of his duties at LCC.

25 4.9 WAC 356-30-300 provides, in relevant part:
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1 (1) Agencies shall evaluate the performance of their employees during their
2 probationary or trial service periods and at least once a year thereafter.

3

4 (6) Each employee whose work is judged unsatisfactory shall be notified in writing
5 of the areas in which the work is considered deficient. Unless the deficiency is
6 extreme, the employee shall be given an opportunity to demonstrate improvement.

7 (7) Allowing probationary employees to gain permanent status or trial service
8 employees to gain permanent status in the class to which they have been promoted
9 without completion of an evaluation may be regarded as neglect of duty,
10 incompetence or insubordination on the part of the supervisor and may be cause for
11 disciplinary action.

12 4.10 RCW 41.06.176 requires employees to be notified in writing of the areas in which their
13 work is judged unsatisfactory. The RCW further states that “[u]nless the deficiency is extreme, the
14 employee shall be given an opportunity to demonstrate improvement.”

15 4.11 Article 29.1 of the Collective Bargaining Agreement requires probationary employees to be
16 evaluated at least once during their probationary period unless they are separated during the
17 probationary period.

18 4.12 Credible testimony established that Appellant was given a written evaluation during his
19 probationary period.

20
21 4.13 Approximately 1 ½ weeks prior to his termination, Appellant met with the Superintendent of
22 LCC, Terry Haines. During this meeting, Superintendent Haines informed Appellant that he was
23 considering terminating Appellant’s probationary appointment and he allowed Appellant an
24 opportunity to respond to the concerns raised about Appellant’s performance. Prior to this meeting,
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1 Appellant had several discussions with his supervisor regarding the completion of his six months of
2 employment.

3
4 4.14 On January 1, 1999, Appellant was given notice of his termination, effective that evening.

5
6 4.15 WAC 356-30-270 provides:

7 (1) An employee may be dismissed during a probationary period after being given
8 written notice indicating the reasons for the dismissal five working days prior to the
effective date of dismissal. . . .

9 (2) An employee dismissed during a probationary period shall not have the right to
10 appeal the dismissal. When proper advance notice of the dismissal is not given, the
11 employee may enter an appeal for payment of salary for up to five days which the
12 employee would have worked had proper notice been given. If such a claim is
not be entitled to reinstatement.

13
14 4.16 Subsequent to Appellant's termination, Respondent determined that Appellant had not
15 received notice of his termination five working days prior to the effective date. Respondent
16 corrected this error by compensating Appellant for the notice period.

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18 4.17 RCW 41.06.186 directs the Washington State Personnel Resources Board to adopt rules
19 designed to terminate employees for inadequate performance. The RCW does not require any
20 action to be taken by Respondent.

21 22 **V. ARGUMENTS OF THE PARTIES**

23 5.1 Appellant argues that he did not receive an appointment letter informing him that he was a
24 probationary employee, he had been previously employed as a permanent employee by DOC, and
25 he was not trained, counseled, or given guidance as required by the merit system rules covering
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1 probationary employees. Therefore, Appellant contends that he was a permanent employee and that
2 Respondent is required to follow the merit system rules and show just cause for his termination.
3 Appellant asserts that he should be reinstated to his position at LCC as a permanent employee with
4 full back pay and benefits.

5
6 5.2 Respondent admits that Appellant was not given an appointment letter, however Respondent
7 contends that Appellant was aware of his probationary status. Respondent asserts that a
8 probationary employee can be terminated before completion of the probationary period without a
9 written evaluation. Respondent further asserts that Appellant was given adequate training,
10 counseling and guidance, that his termination was warranted, and that because he was a
11 probationary employee, Appellant has no right to appeal his termination.

12 13 **VI. CONCLUSIONS OF LAW**

14 64.1 The Personnel Appeals Board has jurisdiction over the parties hereto and the subject matter
15 herein.

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17 6.2 In a hearing on appeal of an alleged rule violation, Appellant has the burden of proof. WAC
18 358-30-170.

19
20 6.3 Appellant has met his burden of proof that Respondent violated WAC 356-30-260(2) by
21 failing to notify him in writing of the length of his probationary period. However, Appellant was
22 aware of his probationary status. Furthermore, an administrative violation does not negate the
23 requirement in the WAC that probationary employees must serve a six month probationary period.
24 The appropriate remedy for Respondent's violation of WAC 356-30-260(2) is to direct Respondent
25 to take steps to prevent or minimize similar mistakes in the future.

1
2 6.4 Appellant has failed to meet his burden of proof that Respondent violated WAC 356-30-270.
3 Any violation of WAC 356-30-270 was corrected by Respondent when it compensated Appellant
4 for the five working days of notice required by the rule. Therefore, this issue is moot.
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6 6.5 Appellant has failed to meet his burden of proof that Respondent violated WAC 356-30-290.
7 Reassignment during a probationary period is permitted by WAC 356-30-290. Appellant failed to
8 provide any evidence that his reassignment from a custody Correctional Officer 2 position to a
9 security Correctional Officer 2 position was contrary to the provisions of the rule.
10

11 6.6 Appellant has failed to meet his burden of proof that Respondent violated WAC 356-30-300
12 or RCW 41.06.176. Here, as in Crawford v. Dept. of Fish and Wildlife, PAB Case No. RULE-95-
13 0008 (1996), the “provisions for notice of employee deficiencies . . . appear to be in the context of
14 employee performance evaluations. WAC 356-10-300(1) merely requires an evaluation some time
15 ‘during’ a probationary period. If the probationary period is cut short because of dismissal of the
16 employee, it does not require completion of a formal evaluation.”
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18 6.7 Appellant has failed to meet his burden of proof that Respondent violated RCW 41.06.186.
19 This RCW requires an action by the Washington State Personnel Resources Board and is not
20 applicable to the actions or inactions of Respondent. Therefore, Appellant’s allegations of a
21 violation of RCW 41.06.186 should be dismissed.
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23 6.8 Appellant’s allegations of a violation of the Collective Bargaining Agreement should be
24 dismissed for lack of jurisdiction. The Personnel Appeals Board has jurisdiction over alleged
25 violations of the merit system rules or laws. The Washington State Personnel Resources Board has
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1 the jurisdiction to determine if the provisions of a collective bargaining agreement have been
2 violated.

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4 **VII. ORDER**

5 NOW, THEREFORE, IT IS HEREBY ORDERED that the appeal of Harold Kupers is granted in
6 part and Respondent is direct to take steps to prevent or minimize similar mistakes in the future.

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8 IT IS FURTHER ORDERED that Harold Kupers' appeal of alleged violations of WAC 356-30-
9 270, WAC 356-30-290, WAC 356-30-300, and RCW 41.06.176 is denied and his appeal of alleged
10 violations of RCW 41.06.186 and the Collective Bargaining Agreement is dismissed.

11 DATED this _____ day of _____, 1999.

12 WASHINGTON STATE PERSONNEL APPEALS BOARD

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14 _____
15 Walter T. Hubbard, Chair

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17 _____
18 Gerald L. Morgen, Vice Chair

19 _____
20 Nathan S. Ford Jr., Member

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Personnel Appeals Board
2828 Capitol Boulevard
Olympia, Washington 98504
(206) 586-1481 or SCAN 321-1481